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consideration of the contract, etc., or any other matter as would entitle him to relief in equity, etc. Section 3300 provides that, if defendant shall not tender such plea, he shall not be precluded from such relief in equity as he would have been entitled to if the preceding section had not been enacted. Held, that the failure of the makers of a past-due negotiable note, the consideration for which had failed and which was held as collateral for a debt of the pledgor for a less amount than the face of the note, to defend an action at law on the note by the pledgee wherein a judgment against them was obtained, or to defend scire facias proceedings to revive the judgment, did not preclude them from setting up equities against the enforcement of the judgment in proceedings by the assignee thereof.

5. Assignments—Defenses against Assignee—Equities between Original Parties.—The rule that where the original debtor in a non-negotiable chose in action is sued by an assignee thereof, the defenses, legal and equitable, which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, applies to all forms of contract not negotiable, and to all defenses which would have been valid between the debtor and the original creditor.

6. Evidence—Presumption.—In the absence of proof, it will not be presumed that a bank, after disclaiming any interest in or right to a judgment on a note which had been assigned to it only as collateral for a debt which was later paid, would attempt to assign the judgment.

Buchanan and Whittle, JJ., dissenting.

SMITH *v.* LURTY.

Nov. 19, 1908.

[62 S. E. 789.]

1. Appeal and Error (§ 1075*)—Assignment of Error—Abandonment.—Error assigned in refusing to permit filing of an amended answer is properly abandoned, on plaintiff conceding the sufficiency of the original answer to put in issue the matter sought to be raised by the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4253; Dec. Dig. § 1075.*]

2. Lost Instruments (§ 8*)—Establishment—Proof—Essential.—To establish a lost instrument as a muniment of title, there must be conclusive proof of its former existence, loss, and contents.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.*]

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

3. Lost Instruments (§ 8*)—Establishment—Evidence—Sufficiency.—Evidence in a suit to establish a lost deed held to show that defendant conveyed to his wife land claimed by her and that the deed was lost or destroyed.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. § 17; Dec. Dig. § 8.*]

4. Witnesses (§ 144*)—Competency—Decedent's Wife.—Decedent's wife, on suing to establish loss or destruction of a deed whereby he conveyed to her land claimed by his devisee, was an incompetent witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 639; Dec. Dig. § 144.*]

5. Lost Instruments (§ 8*)—Proof of Loss—Requisites.—Where the former existence and contents of an alleged lost paper have been clearly proved, and there is no suggestion that the person seeking to establish it could have any motive in alleging its loss, the same high degree of proof of the loss should not be required as where a motive appears.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. § 17; Dec. Dig. § 8.*]

REED et al. v. REED et al.

Nov. 19, 1908.

[62 S. E. 792.]

1. Contracts (§ 11*)—Parties—Mental Capacity—Sufficiency.—One who had been discharged from an insane asylum as "improved," and who thereafter between insane intervals, lasting from two days to two weeks, was quiet and inoffensive, and worked with efficiency, read, voted, and was regarded as having sufficient mental capacity to deed, had sufficient capacity during a lucid interval to contract with his sister to give her his property in consideration of care for him.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 11.*]

2. Frauds, Statute of (§ 125*)—Parol Agreement to Convey—Certainty.—An agreement by decedent that he would give his sister all his property, excepting certain bonds, if she would provide him a home for life and care for him, and if he should not be returned to an insane asylum, was sufficiently definite, within the rule that parol agreements to sell land and can only be enforced when definite.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 276; Dec. Dig. § 125.*]

3. Frauds, Statute of (§ 129*)—Parol Agreement to Convey—Evi-

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.